

**In the Court of Appeals  
for the State of Michigan**

FAZLUL SARKAR,

Plaintiff-Appellant,  
v.

JOHN and/or JANE DOE(S),

Defendant(s), and

PUBPEER, LLC,

Third-Party Appellee.

Docket No. 326667

On Appeal From:

WAYNE CIRCUIT NO. 14-13099-CZ  
HON. SHEILA A. GIBSON

**BRIEF OF AMICUS CURIAE**  
**PUBLIC CITIZEN LITIGATION GROUP**

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Eisenhofer & Liebesman, *Caught by the Net*,  
10 Business Law Today No. 1 (Sept.-Oct. 2000).. . . . . 14

Fischman, *Your Corporate Reputation Online*,  
www.fhdlaw.com/html/corporate\_reputation.htm . . . . . 14

Fischman, <i>Protecting the Value of Your Goodwill from Online Assault</i> , www.fhdlaw.com/html/ bruce_article.htm . . . . .	14
Kendall, <i>Management Advisory- Inaction on Whistleblower Complaints Related to Scientific Integrity Complaints</i> (July 2013), http://naturalresources.house.gov/ uploadedfiles/mgmtadvisoryfwsoigscience.pdf. . . . .	44
Lessig, <i>The Law of the Horse: What Cyber Law Might Teach</i> , 113 Harv. L. Rev. 501 (1999). . . . .	13
Lidsky & Cotter, <i>Authorship, Audiences and Anonymous Speech</i> , 82 Notre Dame L. Rev. 1537 (2007). . . . .	13
2 Mich. Ct. Rules Prac. Text 2302.1 (6 <sup>th</sup> ed.). . . . .	29
Research Triangle Institute, <i>Consequences of Whistleblowing for the Whistleblower in Misconduct in Science Cases</i> (1995). . . . .	44
Restatement (Second) of Torts, § 566. . . . .	37
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The Court granted leave for interlocutory cross-appeals presenting an important First Amendment question—what showings a plaintiff needs to make before it can invoke state power to compel the identification of his anonymous critics. Other state and federal courts, invoking the well-accepted First Amendment right to speak anonymously, and recognizing that First Amendment rights cannot be infringed without a compelling state interest, have consistently held that would-be plaintiffs must make both a legal and an evidentiary showing of merit before government power may be deployed to identify anonymous critics; many states also hold that the court must balance the interests of the plaintiff in securing relief from genuine harm based on a real violation of his rights and of the defendant in remaining anonymous. The Court is urged to follow this consensus approach in deciding whether to compel the identification of the Does in this case.

#### **INTEREST OF AMICUS CURIAE**

Public Citizen, Inc., is a public interest organization based in Washington, D.C. It has members and supporters throughout the country, about 11,000 of them in Michigan. Since its founding in 1971, Public Citizen has encouraged public participation in civic affairs, and has brought and defended numerous cases involving the First Amendment rights of citizens who participate in civic affairs and public debates. See generally <http://www.citizen.org/litigation/briefs/internet.htm>. In particular, over the past eleven years, Public Citizen's attorneys have represented Doe defendants or Internet forum hosts (including a company based in Michigan that hosts anonymous commentary about celebrities), and Public Citizen has appeared as amicus curiae in cases in which subpoenas have sought to identify hundreds of authors of anonymous Internet messages. The courts in these and other cases have adopted slightly different versions of a standard for deciding such cases that was originally developed and suggested by Public Citizen, and adopted by the New Jersey Appellate Division in the *Dendrite* case. On behalf of its members, and on behalf of consumers generally,

amicus has an interest in ensuring that an appropriate standard is developed and satisfied before a court will compel disclosure of identifying information about anonymous speakers on the Internet. The principal interest of amicus is in the adoption of an appropriate standard that will protect freedom of expression, but amicus will also relate the standard it advocates to the record before the Court.

### **QUESTION PRESENTED FOR REVIEW**

In Michigan, may a plaintiff who claims that an anonymous Internet user's speech about him was tortious invoke government power to compel the forum that hosts that speech to provide identifying information, thus stripping the speakers of their First Amendment right to speak anonymously and giving himself the ability to take extra-judicial action against speakers, without showing that he has legally tenable claims and that he has evidence supporting those claims?

Amicus answers this question: **NO**

### **STATEMENT OF FACTS AND PROCEEDINGS BELOW**

#### **A. Background**

Protection for the right to engage in anonymous communication is fundamental to a free society. Indeed, as electronic communications have become essential tools for speech, the Internet in all its forms—web pages, email, chat rooms, and the like—has become a democratic institution in the fullest sense. It is the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997),

From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any

soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer.

Full First Amendment protection applies to speech on the Internet.

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many companies have organized outlets for the expression of opinions. For example, Yahoo! and Raging Bull host message boards for every publicly traded company where investors, and other members of the public, can post discussions about the company. Blogger, WordPress and TypePad give individuals the opportunity to create blogs of their own, on which bloggers can at no cost post discussions of current events, public figures, companies, or other topics while leaving it open for visitors to post their own comments. Other web sites, such as Yelp and Angie's List, have organized forums for consumers to share their experiences with local merchants. And still other sites are organized by industry, such as Trip Advisor that hosts reviews of hotels, restaurants and tourist venues, 800Notes where recipients of telemarketing calls can describe their experiences with cold marketing calls, RateMD's which provides a forum for patients to review medical professionals, and Avvo which enables clients and other lawyers to post reviews of lawyers. PubPeer is a web site that in many ways resembles the old Yahoo! financial message boards, except that its focus, instead of publicly traded companies, is scientific work, and the speakers are generally people who trade observations and express ideas and opinions about previously published scientific work.

The individuals who post messages on such web sites often do so under pseudonyms—similar to the old system of truck drivers using “handles” when they speak on their CB's. Nothing prevents an individual from using his real name, but many people choose nicknames

that protect the writer's identity from those who disagree with him or her, and hence encourage the uninhibited exchange of ideas and opinions.

Many Internet forums have a significant feature—and PubPeer is typical in that respect—that makes them very different from almost any other form of published expression. Subject to requirements of registration and moderation, any member of the public can use the forum to express his point of view; a person who disagrees with something that is said on a message board for any reason—including the belief that a statement contains false or misleading information—can respond to that statement immediately at no cost, and that response can have the same prominence as the offending message. To be sure, like a newspaper, such sites cannot be **required** to print responses to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). But on most Internet forums (including PubPeer), a scientist whose work has been criticized, or those sympathetic to a target of criticism can reply immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that they are right and their critics are wrong.

Because many people regularly revisit message boards, a response is likely to be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

#### **B. Facts and Proceedings in This Case.**

The PubPeer web site, the forum in which the allegedly defamatory statements at issue in this case appeared, owes its existence to widespread dissatisfaction with the ability of the more well-established institutions in the scientific community to tease out possible flaws in published scientific



research and to avoid the potentially serious consequences of scientific fraud. PubPeer allows any member of the public to submit comments about published scientific work for inclusion on the PubPeer web site. Commenters may choose to register for an account, providing an email address and providing a screen name, which might be the commenter's real name or might be a pseudonym. Once a user has registered, the user can use that account to publish comments on PubPeer without pre-screening by a PubPeer editor; all comments under that account appear under the same screenname, thus enabling the account to develop a persona and, possibly, accrue a reputation for careful or less careful analysis. A user can also submit comments without registering, but those comments are withheld from publication pending review by one of PubPeer's volunteer moderators. Those criticized on PubPeer, or others who are supportive of criticized scientific work, are also free to submit comments using the same system. Any comment can be removed by moderators if they conclude that it violated the site's Terms of Service, such as by "writing a fake or defamatory review, trading reviews with other users, or compensating someone or being compensated to write or remove a review; [or] threaten[ing], stalk[ing], harm[ing], ... harass[ing] others, or promot[ing] bigotry or discrimination." Terms of Service, <https://pubpeer.com/tos>.

This case began after PubPeer comments discussed the work of plaintiff Fazlul Sarkar, a prominent cancer researcher, raising questions about what they perceived as anomalies in various images appearing in his publications. These perceived anomalies led some commenters to opine that further inquiry was needed; others described the problem in stronger terms, suggesting that the anomalies might reflect "sloppiness" or "errors," and referred to the possibility of "scientific misconduct" or "research misconduct." Sarkar's counsel wrote to PubPeer, demanding both the removal of various anonymous comments and the identification of the anonymous commenters.

PubPeer editors reviewed the comments in question and removed some of them; but PubPeer declined to remove all of the challenged comments and refused to provide any identifying information.

Sarkar then filed a 28-page complaint against the John Doe defendants who were responsible for the comments about him on PubPeer and elsewhere, quoting verbatim a number of anonymous comments and alleging that they were false and defamatory; he also alleged a variety of other torts, each of which turned on the previous allegations of falsehood, defamatory character, and injury to Sarkar's reputation. Sarkar then sent a subpoena to PubPeer, seeking information in its possession, including both contact information provided in the course of registration for those commenters who had registered, and Internet Protocol addresses for those comments that had been posted by unregistered users. PubPeer moved to quash the subpoena, based on both the First Amendment rights of its users to speak anonymously through its web site, and on its own First Amendment right to maintain an association with its users on an anonymous basis. One of the Doe defendants appeared by counsel to oppose discovery insofar as it sought identifying information for **that** Doe. The trial court granted the motion to quash in several respects, but denied the motion to quash with respect to one of the Doe defendants. PubPeer has been granted leave to appeal insofar as its motion to quash was denied, while Sarkar has been granted leave to appeal insofar as the motion to quash was granted.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. Full First Amendment protection applies to communications on the Internet,

and longstanding precedent recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when a complaint is brought against an anonymous speaker, the courts must balance the right to obtain redress from the perpetrators of civil wrongs against the right of those who have done no wrong to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff complains about the content of material posted online and seeks a judgment granting relief against the posting of that material, including an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

Moreover, suits against anonymous speakers are unlike most tort cases, where identifying an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. In a suit against an anonymous speaker, identifying the speaker gives an important measure of relief to the plaintiff because it enables it to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who not only loses the right to speak anonymously, but may be exposed to efforts to restrain or punish his speech. For example, an employer might discharge a whistleblower, and a public official might use his powers to retaliate against the speaker, or might use knowledge of the critic's identity in the political arena. There is evidence that access to identifying information to enable extra-judicial action may be the only reason some plaintiffs bring such suits (*infra* 13-14).

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. Moreover, our legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors

granting the relief. The challenge for the courts is to develop a test for the identification of anonymous speakers that makes it neither too easy for deliberate defamers to hide behind pseudonyms, nor too easy for a big company or a public figure to unmask critics simply by filing a complaint that purports to state an untested claim for relief under some tort or contract theory.

This Court will not be writing on an entirely clean slate, both because there is a developing consensus among those courts that have considered this question that only a compelling interest is sufficient to warrant infringement of the free speech right to remain anonymous, and because two separate panels of this Court have addressed appeals from circuit court orders compelling discovery to identify anonymous online speakers reversing the discovery order but based on widely disparate reasoning. Nationally, and outside Michigan, courts have held beginning with *Dendrite Int'l v Doe No. 3*, 342 NJ Super 134; 775 A2d 756 (NJ App 2001), that a court faced with a demand for discovery to identify an anonymous Internet speaker so that he may be served with process should: (1) provide notice to the potential defendant and an opportunity to defend his anonymity; (2) require the plaintiff to specify the statements that allegedly violate his rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of his claims; and, in many jurisdictions (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing his right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a plaintiff does not obtain an important form of relief – identifying its anonymous critics – and that the defendant is not denied important First Amendment rights unless the plaintiff has a realistic chance of success on the merits.

Meeting these criteria can require time and effort on a plaintiff's part. However, everything

that the plaintiff must do to meet this test, he must also do to prevail on the merits of his case. Moreover, the *Dendrite* test is consistent with the many Michigan precedents holding favoring early disposition of defamation actions because the mere burdens of the litigation can create an impermissible chilling effect on protected expression. So long as the test does not demand more information than a plaintiff would reasonably be able to provide shortly after filing the complaint, without taking any discovery—and other cases show that plaintiffs with valid claims are easily able to meet the *Dendrite* test—the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker.

Although two Michigan cases address this subject, *Ghanam v Does*, 303 Mich App 522, 541; 845 NW2d 128 (2014), and *Thomas Cooley Law School v Doe 1*, 300 Mich App 245; 833 NW2d 331 (2013), they do not provide a good guide for this Court’s decision. A majority of the six Court of Appeals judges across the two panels that have addressed the issue agreed that Michigan should follow the national consensus rule, but the *Ghanam* panel felt it was bound by the reasoning of the *Cooley* majority to reject the national consensus rule. The *Ghanam* panel did express the view that *Cooley*’s holding that a plaintiff need not make a showing that its claims can succeed applies only when the Doe defendant has participated in the litigation. Amicus contends that this limitation on the holding should extend to any case in which a Doe defendant has not generally appeared and answered the complaint, inasmuch as **that** was the way in which the defendant in *Cooley* participated in that case.

Moreover, the basis for the majority’s analysis in *Cooley*—that an evidence requirement is based on foreign law and that the better approach is to follow Michigan’s own rules and procedures—is demonstrably wrong. The requirement of presenting evidence to overcome the First

Amendment right to speak anonymously is based on the First Amendment, which is not “foreign law,” and because the First Amendment supports a privilege against disclosure, there is nothing inconsistent with incorporating a First Amendment analysis into the decision whether to grant a protective order or a motion to quash, as decisions of the Michigan and federal courts typically do. If Michigan does not require **evidence** of falsity, and the other elements of the sorts of tort claims that are typically alleged against anonymous speakers, whether under its own rules or under the First Amendment, it will stand alone, and no sound reasons have been given for refusing to require a plaintiff to submit evidence of falsity before he takes away a user’s First Amendment right to speak anonymously. Nor is there any sound basis for the distinction that the parties’s briefs discern in *Cooley* and *Ghanam*, whereby there is one set of proof required in cases where the Doe defendant has appeared and another where it is the ISP that appears.

**I. MICHIGAN SHOULD APPLY THE SAME STANDARDS AS EVERY OTHER APPELLATE COURT THAT HAS DECIDED THE ISSUE BY REQUIRING SHOWING OF MERIT ON BOTH THE LAW AND THE FACTS BEFORE A SUBPOENA TO IDENTIFY AN ANONYMOUS SPEAKER IS ENFORCED.**

Appellate courts in eleven states plus the District of Columbia, as well as two federal appellate courts, have addressed the same question on which the decision in this case turns—what showing should a plaintiff have to make before it may be granted access to the subpoena power to identify an anonymous Internet user who has criticized the plaintiff. As shown below at pages 16 to 20, **every** appellate court that has addressed the question has decided that it is not enough for the plaintiff to file a facially valid complaint; **every** appellate court has held that the plaintiff must make a factual showing, not just that the anonymous defendant has made harsh critical statements, but also that the statements are actionable **and** that there is an evidentiary basis for the prima facie elements

of the claim. Some appellate courts have required, as well, an express balancing of the plaintiff's interest in prosecuting its lawsuit against the anonymous defendant's reasons for needing to stay anonymous.

This section of the brief shows the unanimity of the judicial treatment of this issue, and urges that the Michigan courts follow the same course. It then shows that the court below incorrectly applied the *Dendrite / Cahill* test, by misapprehending the law of defamation, and by apparently presuming that the statements as alleged were in fact false and defamatory, as though the matter were before the Court on a motion to dismiss the complaint, which requires the Court to accept the pleadings as alleged.

A defamation plaintiff is uniquely in a position to know why the statement that it alleges to be false is, in fact, false and defamatory. Unlike, for example, a personal injury plaintiff, who may know only that she or he is suffering in some way, without knowing why, the defamation plaintiff typically knows, before it decides to file suit, the evidence that would show the defendant's accusation to be false and defamatory. There is typically no reason why, at the outset of a case, a plaintiff about whom false statements have been made cannot present evidence of falsity.

**A. The Constitution Limits Compelled Identification of Anonymous Internet Speakers.**

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y v Village of Stratton*, 536 US 150, 166-167 (2002); *McIntyre v Ohio Elections Comm.*, 514 US 334 (1995); *Talley v California*, 362 US 60 (1960). *See also NLRB v. Midland Daily News*, 151 F3d 472, 475 (CA 6 1998) (recognizing that discovery to identify anonymous advertisers engaged in lawful commercial speech could chill speech). These cases have celebrated the important role

played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers:

[A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, **an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.**

\* \* \*

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

*McIntyre*, 514 US at 341-342, 356 (emphasis added).

The right to speak anonymously is fully applicable online. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v ACLU*, 521 US 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *Independent Newspapers v Brodie*, 966 A2d 432 (Md 2009); *In re Does 1-10*, 242 SW3d 805 (Tex App 2007); *Mobilisa v Doe*, 170 P3d 712 (Ariz App 2007); *Doe v Cahill*, 884 A2d 451 (Del 2005); *Dendrite v Doe*, 775 A2d 756 (NJ App 2001).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their gender. They may be associated with an organization but want to express an opinion of their



own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation.

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the Internet's technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, starts a path that can be traced back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv L Rev 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom. Consequently, to avoid the Big Brother consequences of a rule that enables any company or political figure to identify its critics, the law provides special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L Rev 1537 (2007).

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark*, California Law Week, Volume 1, No. 9, at 16, 18 (1999). Mere identification of anonymous critics may be all that some plaintiffs desire to achieve through the lawsuit. An early advocate of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, [www.fhdlaw.com/html/corporate\\_reputation.htm](http://www.fhdlaw.com/html/corporate_reputation.htm); Fischman, *Protecting the Value of Your Goodwill from Online Assault*, [www.fhdlaw.com/html/](http://www.fhdlaw.com/html/)

bruce\_article.htm. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because “[t]he mere filing of the John Doe action will probably slow the postings.” Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* See *Swiger v Allegheny Energy*, 2006 WL 1409622 (ED Pa May 19, 2006), *aff’d*, 540 F.3d 179 (3rd Cir. 2008) (company filed Doe lawsuit, obtained identity of employee who criticized it online, fired the employee, and dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity). Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff.

Companies that make pornographic movies have recently been bringing mass copyright infringement lawsuits against hundreds of anonymous Internet users at a time, without any intention of going to trial, but hoping that embarrassment at being subpoenaed and then publicly identified as defendants in such cases will be enough to induce them to pay thousands of dollars in settlements. *AF Holdings, LLC v Does 1-1058*, 752 F3d 990, 992 (CA DC 2014); *Mick Haig Productions v Doe*, 687 F3d 649, 652 & n.2 (CA5 2012); *Patrick Collins v. Doe 1*, 288 FRD 233 (EDNY 2012). Indeed, some pornographic films are now being made not to be sold, but to be used as the basis for subpoenas to identify alleged downloaders who can then be pressured to “settle.” *On The Cheap, LLC v Does 1-5011*, 280 FRD 500, 504 n.6 (ND Cal 2011). Amicus does not suggest that Sarkar has brought this lawsuit to shake down anybody, but the rules governing subpoenas must be crafted with the recognition that some plaintiffs serving such subpoenas will not be properly motivated.

The fact that plaintiff Sarkar is not suing in his capacity as a government employee does not

exempt his subpoena from First Amendment scrutiny; he has invoked judicial authority to compel a third party to provide information. A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. That is why, for example, an action for damages for defamation, even when brought by an individual, must satisfy First Amendment scrutiny, *Gertz v Robert Welch, Inc.*, 418 US 323, 349 (1974); *New York Times Co. v Sullivan*, 376 US 254, 265 (1964), and it is why a request for injunctive relief, even at the behest of a private party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v Keefe*, 402 US 415 (1971); *Shelley v Kraemer*, 334 US 1 (1948).

Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 US at 347. This Court has recognized a “news writers’ privilege” against civil discovery directed to third-party witnesses, *Matter of Photo Marketing Ass’n Intern.*, 120 Mich App 527, 531-532, 327 NW2d 515, 517-518 (1982), following a decision from the United States Court of Appeals for the Third Circuit, *Riley v City of Chester*, 612 F2d 708, 716 (CA3 1979), and subsequently the Sixth Circuit has squarely held that a compelling interest is needed to support discovery to identify anonymous advertisers. *Midland Daily News, supra*, 151 F3d at 475.

As one court said in refusing to order identification of anonymous Internet speakers whose identities were allegedly relevant to the defense against a shareholder derivative suit, “If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.” *Doe v 2theMart.com*, 140 F Supp2d 1088, 1093 (WD Wash 2001). *See*

also *Columbia Insurance Co. v Seescandy.com*, 185 FRD 573, 578 (ND Cal 1999):

People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . **People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.**

(emphasis added).

**B. Every Appellate Court to Address the Issue Has Required a Detailed Legal and Evidentiary Showing for the Identification of John Doe Defendants Sued for Criticizing the Plaintiff.**

The fact that a plaintiff has sued over certain speech does not create a compelling government interest in taking away defendant's anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Cahill*, 884 A2d at 457.

Courts have drawn on the media's privilege against revealing sources in civil cases to enunciate a similar rule protecting against the identification of anonymous Internet speakers. The leading decision on this subject, *Dendrite v Doe*, 775 A2d 756 (NJ App 2001), established a five-part standard that became a model followed or adapted throughout the country:

- 1. Give Notice:** Courts require the plaintiff (and sometimes the Internet Service Provider) to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.
- 2. Require Specificity:** Courts require the plaintiff to allege with specificity the

speech or conduct that has allegedly violated its rights.

**3. Ensure Facial Validity:** Courts review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.

**4. Require An Evidentiary Showing:** Courts require the plaintiff to produce evidence supporting each element of its claims.

**5. Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.

*Id.* at 760-61.

The fifth part of the *Dendrite* test is less settled; as shown below, some jurisdictions follow it and some do not. Doe argues below that Court should adopt it. But the important point at this stage of the proceedings is that the first four parts of the test represent the minimum protections required by the First Amendment, and that therefore have been adopted by all the appellate courts that have addressed the issue. Michigan should do no less, and, explained below, the trial court's decision should therefore be affirmed in part and reversed in part based on those prongs of the test alone.

The leading authority for rejection of the fifth, explicit balancing stage of the analysis is the Delaware Supreme Court in *Doe v Cahill*, 884 A2d 451. In *Cahill*, the trial court had ruled that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters so long as he was not proceeding in bad faith and could establish that the statements about him were actionable because they might have a defamatory meaning. However, the Delaware Supreme Court ruled that a plaintiff must put forward evidence sufficient to establish a prima facie case on all elements of a defamation claim that ought to be within his control without discovery, including evidence that the statements are false.

Doe argues in the last part of this brief for adoption of the original *Dendrite* standard rather than the *Cahill* variation, but at this juncture of the argument it is sufficient to note how uniformly appellate courts outside Michigan have adopted rules comparable to either *Dendrite* or *Cahill*.

The following is a comprehensive summary of the state appellate courts that have endorsed the *Dendrite* test, including the final balancing stage:

*Mobilisa v Doe*, 170 P3d 712 (Ariz App 2007), where a private company sought to identify the sender of an anonymous email message who had allegedly hacked into the company's computers to obtain information that was conveyed in the message. Directly following the *Dendrite* decision, and disagreeing with the Delaware Supreme Court's rejection of the balancing stage, the court analogized an order requiring identification of an anonymous speaker to a preliminary injunction against speech. The Court called for the plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides.

*Independent Newspapers v Brodie*, 966 A2d 432 (Md 2009), where the court required notice to the Doe, articulation of the precise defamatory words in their full context, a prima facie showing, and then, "if all else is satisfied, balanc[ing] the anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity." *Id.* at 457.

*Mortgage Specialists v Implode-Explode Heavy Industries*, 999 A2d 184 (NH 2010), where a mortgage lender sought to identify the author of comments saying that its president "was caught for fraud back in 2002 for signing borrowers names and bought his way out." The New Hampshire Supreme Court held that "the *Dendrite* test is the appropriate standard by which to strike the balance between a defamation plaintiff's right to protect its reputation and a defendant's right to exercise free speech anonymously." *Id.* at 193.

*Pilchesky v. Gatelli*, 12 A3d 430 (Pa Super 2011), which held that a city council chair had to meet the *Dendrite* test before she could identify constituents whose scabrous accusations included selling out her constituents, prostituting herself after having run as a reformer,

and getting patronage jobs for her family.

*In re Indiana Newspapers*, 963 NE2d 534 (Ind. App. 2012), where the recently retired head of a local charity sought to identify an anonymous individual who had commented on a newspaper story about the financial problems of the charity by asserting that the missing money could be found in the plaintiff's bank account.

Several other state appellate courts have followed a *Cahill*-like summary judgment standard without express balancing:

*Krinsky v Doe 6*, 72 Cal Rptr 3d 231 (Cal App 2008), where the appellate court reversed a trial court decision allowing an executive to learn the identity of several online critics who allegedly defamed her by such references as “a management consisting of boobs, losers and crooks.”

*In re Does 1-10*, 242 SW3d 805 (Tex App 2007), which reversed a decision allowing a hospital to identify employees who had disparaged their employer and allegedly violated patient confidentiality through posts on a blog.

*Solers v Doe*, 977 A2d 941 (DC 2009), where the court held that a government contractor could identify an anonymous whistleblower who said that plaintiff was using unlicensed software if it produced evidence that the statement was false. The court adopted *Cahill* and expressly rejected *Dendrite*'s balancing stage.

*Doe v. Coleman*, 436 SW3d 207, 211 (Ky App 2014): The Kentucky Court of Appeals granted a writ of prohibition, overturning a trial court order that refused to quash a subpoena seeking to identify anonymous speakers who had criticized the chairman of the local airports board, because the trial court had not required the plaintiff to set forth a prima facie case for defamation under the summary judgment standard.

Most recently, the Washington Court of Appeals endorsed the evidence requirement, while putting off for another day the question whether to have a balancing stage, noting that the record before the court contained no information to which the balancing stage could be applied. *Thomson v Doe*, 189

Wash App 45; 356 P3d 727 (Wash App 2015).

Illinois has found it unnecessary to apply the First Amendment to a petition for pre-litigation discovery because the state's rules already required a verified complaint, specification of the defamatory words, determination that a valid claim was stated, and notice to the Doe. *Hadley v Doe*, 393 Ill Dec 348; 34 NE3d 549, 556 (2015); *Maxon v Ottawa Pub. Co.*, 929 NE2d 666 (Ill App 2010); *Stone v Paddock Pub. Co.*, 356 Ill Dec 284; 961 NE2d 380 (Ill App 2011). (A Virginia appellate decision about the standard for identifying anonymous defendants was ultimately vacated because Virginia lacked subpoena jurisdiction over the ISP. *Yelp, Inc. v Hadeed Carpet Cleaning*, 770 SE2d 440 (2015)). And the United States Court of Appeals for the Ninth Circuit, in the course of denying petitions for mandamus relief, *In re Anonymous Online Speakers*, 611 F3d 653, 661 (CA 9 2010), *revised opinion adopted on rehearing*, 661 F3d 1168 (CA9 2011), said that "imposition of a heightened standard is understandable" in a case involving political speech, but that when the Doe defendants are commercial actors tearing down a competitor, less protection for anonymity is appropriate. Similarly, in a case involving the infringement of large numbers of copyrighted sound recordings, the Court of Appeals for the Second Circuit upheld an order that the ISP identify the anonymous defendant because the plaintiff had made a concrete prima facie showing of infringement, including the submission of an affidavit, sworn on personal knowledge, that identified specific copyrighted sound recordings and specified the means by which the affiant had identified Doe's Internet Protocol address with the copying of those recordings. *Arista Records v Doe 3*, 604 F.3d 110 (CA2 2010).

Federal district courts have repeatedly followed *Cahill* or *Dendrite*. *E.g.*, *Highfields Capital Mgmt. v Doe*, 385 F Supp2d 969, 976 (ND Cal 2005) (required an evidentiary showing followed by



express balancing of “the magnitude of the harms that would be caused to the competing interests”); *Art of Living Foundation v Does 1-10*, 2011 WL 5444622 (ND Cal Nov. 9, 2011) (endorsing the *Highfields Capital* test); *Fodor v Doe*, 2011 WL 1629572 (D Nev Apr. 27, 2011) (followed *Highfields Capital*); *Koch Industries v Doe*, 2011 WL 1775765 (D Utah May 9, 2011) (“The case law ... has begun to coalesce around the basic framework of the test articulated in *Dendrite*,” quoting *SaleHoo Group v Doe*, 722 F Supp2d 1210, 1214 (WD Wash 2010)); *Best Western Int’l v Doe*, 2006 WL 2091695 (D Ariz July 25, 2006) (court used a five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *In re Baxter*, 2001 WL 34806203 (WD La Dec. 20, 2001) (preferred *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); *Sinclair v TubeSockTedD*, 596 F Supp2d 128, 132 (DDC 2009) (court did not choose between *Cahill* and *Dendrite* because plaintiff would lose under either standard); *Alvis Coatings v Does*, 2004 WL 2904405 (WDNC Dec. 2, 2004) (court ordered identification after considering a detailed affidavit about how certain comments were false); *Doe I and II v Individuals whose true names are unknown*, 561 F Supp2d 249 (D Conn 2008) (identification ordered only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress).

**C. Arguments Against Requiring Civil Plaintiffs to Make an Evidentiary and Legal Showing Before Imposing on the First Amendment Right to Speak Anonymously Are Unpersuasive.**

Plaintiffs who seek to identify Doe defendants often suggest that requiring the presentation of evidence to obtain enforcement of a subpoena to identify Doe defendants is too onerous a burden, because plaintiffs who can likely succeed on the merits of their claims will be unable to present such proof at the outset of their cases. Quite to the contrary, however, many plaintiffs succeed in

identifying Doe defendants in jurisdictions that follow *Dendrite* and *Cahill*. E.g., *Fodor v Doe*, *supra*; *Does v. Individuals whose true names are unknown*, *supra*; *Alvis Coatings v Does*, *supra*. Indeed, in *Immunomedics v Doe*, 775 A2d 773 (NJ App 2001), a companion case to *Dendrite*, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the Does were identified while two were protected against discovery. Moreover, this argument fails to acknowledge the fact that an order identifying the anonymous defendant is a form of relief, relief that can injure the defendant (by exposing the defendant to retaliation at the hands of the plaintiff and/or his supporters), and relief that can benefit the plaintiff by chilling future criticism as well as by identifying critics so that their dissent can be more easily addressed. Courts do not and should not give relief without proof.

The approach in other states, requiring presentation of evidence in support of the elements of a defamation plaintiff's prima facie case, is also consistent with Michigan's longstanding view that summary disposition is needed to ensure that the burdens of defamation litigation do not themselves create a chilling effect on protected expression. *Ireland v Edwards*, 230 Mich App 607, 613 n4, 484 NW2d 632 (Mich App 1998), *quoting Lins v Evening News Ass'n*, 129 Mich App 419, 425, 342 NW2d 573 (Mich App 1983). The destruction of a defendant's First Amendment right of anonymous speech is yet another way that libel litigation can chill speech, and *Dendrite's* solution of an early look at the merits of the claim, to decide whether there is a good reason to take away anonymity, is a sound approach to balancing the parties' respective interests.

Plaintiffs seeking such discovery often argue as well that there is nothing to balance on the anonymous defendant's side of the scale because defamation is outside the First Amendment's protection and the speech at issue in this case is defamatory. But this argument begs the question,

and courts in other states, facing precisely the same argument, have understood that such arguments are fundamentally unsound. Indeed, the Supreme Court has held that even in the defamation context, false speech can be protected by the First Amendment unless the speech is shown to have been knowingly or recklessly false. *United States v Alvarez*, 132 SCt 2537 (2012). At this point, Sarkar has made only allegations, and the issue in the case is what showing a plaintiff should have to make before an anonymous critic is stripped of that anonymity by an exercise of government power. As we show in the next part of the brief, although Sarkar has claimed that some false statements have been made about his published work, he has submitted no evidence in support of those claims, nor shown that the statements on which the suit is based are factual (instead of being nonactionable opinion).

**D. Previous Michigan Court of Appeals Decisions Addressing Subpoenas to Identify Anonymous Defendants Do Not Preclude Application of the First Amendment Requirement of Producing Evidence to Support Plaintiff’s Claims Before Enforcing a Subpoena to Identify Anonymous Defendants.**

**1. The Proper Interpretation of *Cooley* and *Ghanam*.**

In two previous decisions, panels of this Court have addressed trial court decisions enforcing subpoenas to identify anonymous defendants, in each case reversing the enforcement order. Although these decisions followed differing and to some extent inconsistent reasoning, neither decision prevents this Court from relying on plaintiff’s failure to present evidence establishing a prima facie case of defamation and hence affirming the order below to the extent that it granted the motion to quash, and reversing the order insofar as it ordered identification of one of the Doe defendants.

The first case on this topic to reach this Court was *Thomas Cooley Law School v Doe 1*, 300

Mich App 245; 833 NW2d 331 (2013), in which a law school sued an anonymous former student who had created a gripe site entitled Thomas Cooley Law School Scam. The blog castigated several aspects of the law school’s admissions and curriculum practices, contending that the school was essentially ripping off prospective lawyers by deliberately admitting many students who could not realistically expect to graduate and profiting from high tuition charges while heartlessly pushing many students out the door. The blog used very rhetorical and sarcastic language, and characterized the school’s practices as criminal. Shortly after the law school sent a subpoena to the California-based host of the blog, seeking the identity of the blogger, that company complied with the subpoena, but the blogger nevertheless sought a protective order, contending that the disclosure of identifying information constituted a form of inadvertent disclosure and asking that the plaintiff law school be ordered to refrain from further disclosing the information. The trial judge ultimately denied the motion for a protective order. He ruled first that the *Dendrite* analysis should be applied, but that no evidentiary showing of falsity had to be made because the Doe’s reference to criminal misconduct constituted libel per se and consequently excused plaintiff from any requirement of showing falsity or actual malice.

The trial judge stayed its order pending appeal, and this Court granted leave to appeal. The Court held that the trial court had erred by applying “foreign law”—that is, the analysis of *Dendrite*—instead of relying on Michigan’s rules concerning motions for a protective order and for summary disposition, which the Doe defendant, having been identified and hence served with process, was in a position to do. The Court reversed the order allowing the defendant law school to identify the Doe and remanded the case to allow the case to proceed on a motion for protective order and, possibly for summary disposition. Judge Beckering filed an opinion concurring in part and

dissenting in part; the separate opinion agreed with the decision to vacate the order allowing Doe to be identified and to require the trial judge to consider anew whether to grant a protective order protecting Doe from further loss of anonymity, but disagreed with the majority's analysis because Judge Beckering accepted Doe's argument that a modified *Dendrite* approach was the right standard by which to weigh the protective order motion.

The law school did not seek Supreme Court review of this decision; the student could not do so even though he disputed the legal analysis because, after all, he was the winner on appeal. On remand, the trial court allowed the parties to pursue discovery and, indeed, to file motions for summary disposition, while forbidding the law school from further disclosing the Doe's identity. The case was eventually settled without the Doe's identifying information ever having been fully released although, as discussed at page 30-31, *infra*, the plaintiff was able to do the anonymous defendant great harm by taking advantage of its knowledge of his identity.

The second case involving a subpoena to reach this Court was *Ghanam v Does*, 303 Mich App 522, 541; 845 NW2d 128 (2014), a case involving comments about a public official that had been posted on The Warren Forum, an Internet message board. After the local media reported on the disappearance of tons of rock salt from the city's storage dome, and the expenditure of city funds to buy more garbage trucks, there were a series of sarcastic postings to the Forum that mentioned plaintiff Ghanam and his ability to profit personally from the sale of surplus public works equipment. Construing these comments as accusations of the theft of public property, Ghanam subpoenaed the owner of the Warren Forum, who moved to quash, arguing both that Ghanam had introduced no evidence that any of the facts cited in allegedly actionable comments were false, and also that all of the statements were rhetorical statements of opinion rather than actionable statements of fact. The

trial court denied the motion to quash and ordered Munem to produce identifying information, but this Court granted leave to appeal, and, as in *Cooley*, the Court reversed. This panel of the Court was unanimous in declaring its agreement with the *Dendrite / Cahill* analysis, and said that if it were writing on a clean slate, it would have agreed with the dissent in *Cooley*, but “we are bound by this Court’s conclusion in *Cooley* that MCR 2.032(C) and MCR 2.116(C)(8) alone are sufficient to protect a participating defendant’s First Amendment rights.” 845 NW2d at 141. However, because the anonymous defendants were not participating in the case, the *Ghanam* court felt free to address the viability of plaintiff’s lawsuit, and it held that the statements on which Ghanam was suing were opinions, not actionable statements of fact. Ghanam’s request for Supreme Court review was denied.

Amicus questions whether the *Cooley* panel’s decision not to employ the analysis of either *Dendrite* or *Cahill* was a holding that ever precludes a trial judge from deciding, in the course of applying Michigan’s rules governing motions for a protective order, that First Amendment consideration require the plaintiff to present evidence in support of its claims to justify the exercise of state power to compel a non-party to produce identifying information. The narrow holding of *Cooley* was that the trial court had abused its discretion in authorizing the plaintiff in that case to disclose publicly the identifying information that it had already obtained about the Doe, and the case was remanded to allow the trial judge to exercise his discretion whether to do so. And one of the errors that the trial judge was held to have committed was based on his mistaken understanding of the First Amendment — that is to say, whether “all accusations of criminal activity are automatically defamatory.” The majority also held that one issue that the trial court may consider in deciding a motion for a protective order is whether “the interests that he or she is trying to protect are constitutionally shielded.”

Moreover, the *Cooley* panel’s objection to the consideration of “foreign law” in deciding whether to grant a protective order is confusing. To be sure, *Dendrite*, *Cahill*, and other state appellate rulings are the decisions of “foreign” courts (that is, the courts of states outside Michigan), but those courts rested their decisions on their understanding of the requirements that the First Amendment imposes when state power is invoked to impair free speech rights, and the First Amendment is certainly **not** foreign law. In this case, both the Doe, and the owner of the forum, argue that the First Amendment bars compulsory process that strips anonymous speakers of their First Amendment right to keep their speech anonymous—including from the target of their criticism — and there is no reason why a Michigan court cannot consider the First Amendment as the source of a privilege against discovery

Indeed, Michigan courts, like the federal courts in Michigan and the United States Court of Appeals for the Sixth Circuit, addressing discovery motions under the analogous provisions of the Federal Rules of Civil Procedure, do consider First Amendment concerns when they are raised in support of privileges barring discovery. For example, in *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 38; 654 NW2d 610 (2002), *overruled on other grounds* in *Stand Up For Democracy v Secretary of State*, 492 Mich 588; 822 NW2d 159 (2012), this Court upheld a protective order barring depositions of petition signers in light of “the signers’ powerful interest in participating in political speech protected by the First Amendment without fear of subsequently facing adversarial questions under oath.” Similarly, this Court extended a qualified privilege to protect confidential sources from subpoena to a trade association in an antitrust case. *Matter of Photo Marketing Ass'n International*, 120 Mich App 527, 532 (Mich App 1982).

Similarly, federal courts in Michigan have, on numerous occasions, looked to the First

Amendment rights when determining the balance of equities in discovery, *see, e.g., In re DaimlerChrysler AG Securities Litigation*, 216 FRD 395, 401 (ED Mich 2003) (“the unavailability of a general qualified privilege [does not] render the First Amendment or the Respondents’ status as news-gatherers irrelevant to the question of whether these subpoenas should be enforced”). In *NLRB v. Midland Daily News*, the Sixth Circuit upheld a lower court’s decision that enforcement of a subpoena upon a newspaper to unmask an anonymous advertiser would chill anonymous speech, 151 F3d 472, 475 (CA6 1998). *See also Omookehinde v Detroit Board of Educ.*, 251 FRD 261, 265 (ED Mich 2007) (balancing non-party’s First Amendment rights against the needs of plaintiff in discovery); *Southwell v Southern Poverty Law Center*, 949 FSupp 1303, 1312 (WD Mich 1996) (“case-by-case balancing of constitutional and societal interests is necessary to determine whether First Amendment interests would be jeopardized by ordering disclosure” of an anonymous source’s identity); *Convertino v US Dept. of Justice*, 2008 WL 4104347, at \*8 (ED Mich Aug 28, 2008) (weighing First Amendment interests against disclosure of information in response to a subpoena); *Pragovich v IRS*, 676 F Supp2d 557, 571 (ED Mich 2009) (weighing imposition on petitioner’s First Amendment rights as part of abuse of process analysis). And, because MCR 2.302 is based upon FRCP Rule 26, and was written to make Michigan discovery practice closely resemble federal practice, *See Cabrera v Ekema*, 265 Mich App 402, 407 n1 (Mich App 2005), *see also* 2 Mich. Ct. Rules Prac., Text 2302.1 (6<sup>th</sup> ed.), the interpretation of Rule 26 can guide Michigan courts in deciding how MCR 2.302 should incorporate consideration of constitutional rights.

Because *Ghanam* suggested that *Cooley*’s refusal to apply the *Dendrite* analysis was limited to cases where the Doe defendants are participating in the case, some of the briefing by the parties to this appeal argues about how that rule should apply in this case. But the Doe in *Cooley* was able



to participate in the litigation of that case in a very different way than the Doe in this case, who learned of the subpoena for identifying information and has been able to prevent Sarkar from learning her identity while opposing enforcement of the subpoena. In *Cooley*, the plaintiff was **identified**, was served with process and hence subjected to the personal jurisdiction of the trial court; his counsel entered a general appearance and filed an answer in addition to arguing against being publicly identified on the face of the amended complaint. It was because Doe had made a full appearance in the litigation that Doe was in a position to file a motion for summary disposition. The one Doe in this case who has appeared by counsel is very differently situated, and even if the parties are right in arguing based on the distinction noted by the *Ghanam* panel, Doe is not participating in the manner that *Ghanam* contemplated as bringing into play *Cooley*'s rule against applying a *Dendrite* analysis. Hence, even that Doe should be entitled to invoke the *Dendrite* procedure.

Moreover, although Public Citizen applauds the effort of the *Ghanam* majority to limit the constitutional damage done by the majority opinion in *Cooley*, it respectfully disagrees with drawing a distinction between whether the Doe has received notice of the subpoena and had been able to retain counsel to oppose enforcement of the subpoena. The rights of a defendant are no less when the Doe is represented by counsel, and the potential impingement on the rights of the anonymous defendant is no less just because the Doe has her own counsel. Moreover, drawing a constitutional line in that manner might create a perverse incentive for internet service providers who have a means of notifying the targets of subpoenas to withhold notice, and for Doe defendants who receive notice to refrain from retaining counsel to represent their interests in connection discover motion practice. A Doe's mere opposition to discovery without should not enable plaintiffs to make less of a showing that their lawsuits have arguable merit by producing evidence to support a prima facie case of

defamation or some other tort.

**2. Sarkar's Request to Learn Does' Names Subject to a Protective Order Should Be Denied.**

Sarkar argues that, even if the court holds that he must present evidence of wrongful speech before the Doe defendants lose their right to speak anonymously, he should at least be given the Does' identifying information subject to court-ordered limits on the way he can use that information. Although such protective orders are one approach that can help resolve discovery disputes, where the plaintiff has not been able to present evidence supporting his claims for relief, or where the plaintiff has been unable to articulate a legal theory under which the challenged postings are statements of actionable fact rather than constitutionally protected opinions, the better practice is for the trial court to choose the first option listed in MCR 2.302(C)(1) of permissible outcomes of a motion for a protective order : "that discovery not be had." That is the protection that best serves a defendant's constitutional interest in being able to make criticisms anonymously. Indeed, once a plaintiff that is angry about being criticized learns the identity of the Doe, that plaintiff will often look for ways to make the previously-anonymous defendant pay a price for criticism, even if that price is not inflicted through litigation.

The aftermath of the litigation in the *Cooley* case is instructive. Because the anonymous defendant in that case was a former student at Thomas Cooley Law School, the school received an inquiry about the defendant from the state bar (not Michigan) to which the Doe applied for admission. Cooley sought leave to take its knowledge of the identity of its strident critic into account in responding to the Bar's inquiry, and the trial judge granted such permission on the condition that, pursuant to standard practices governing inquiries by character and fitness committees, Cooley's

responses would be treated as confidential. *Cooley Law School v. Doe*, Order Clarifying November 8, 2011 Ruling (Ingham Cy. Super. Ct. Feb. 23, 2012). Cooley made clear in its request to the trial judge (which was filed under seal because the Doe's name was used throughout) that it intended to tell the bar that the existence of the critical blog reflected poorly on the Doe's character, *Thomas Cooley Law School v. Doe*, Cooley's Sealed Motion and Brief for Clarification of November 8, 2011 Order, (Ingham Cy. Super. Ct. Feb. 10, 2012), and, in fact, the result of Cooley's confidential response to the Bar's inquiry was that Doe had to incur the significant expense (in the five figures) of retaining counsel to deal with the character and fitness aspect of his bar application, not to speak of suffering a delay in the Doe's admission to the Bar for nearly eighteen months.

In *Cooley*, the plaintiff **asked** permission to use the otherwise confidential identity of the Doe, and the plaintiff had absolute immunity from being held liable for the contents of its responses to the Bar's inquiry. But the most serious potential consequence of being identified to a plaintiff in response to a subpoena is exposure to forms of extrajudicial self-help that are unethical and illegal, and there is serious danger of such consequences here. As amicus discusses more fully in the final section of this brief, addressing the reasons for adopting the final balancing stage of the *Dendrite* analysis, scientists are exposed to a variety of situations in which their careers can be torpedoed by the personal hostility of a major figure in their field, because the processes of acquiring grants for research projects, of having research papers selected for publication in journals, and of being hired for new jobs or being promoted within the academic or research community, often rests on a system of peer review by professionals whose identity is not disclosed to the applicant. If plaintiff Sarkar, or one of his own graduate students or other supporters, were to serve on a peer review panel for a grant proposal, or proposed publication, or possible promotion for one of the previously anonymous

authors on PubPeer who criticized Sarkar, they could effectively retaliate, but without violating a protective order by disclosing confidential information in the process. Indeed, disclosing the confidential information could make such a retaliatory act less effective (by disclosing a reason for bias on the reviewer's part). And such retaliation would likely be completely undetectable.

There is, indeed, a certain irony in Sarkar's contention that a handful of anonymous comments from random Internet users who are utterly without the clout of powerful positions have seriously damaged his career, while at the same time demanding that he should be given access to information about his critics that **he** could use to inflict significant damage on their careers. Amicus does not intend, in making this point, to suggest that Sarkar or his proteges in the world of cancer research **would** engage in such retaliation. But the danger is too great to give Sarkar information that could expose the Doe defendants in this case to the danger of such retaliation. Instead, unless Sarkar can present evidence and legal argument to show that he has viable claims against any given Doe, the Court should hold that the First Amendment bars discovery of that Doe's identity.

## **II. SARKAR HAS NOT MADE THE SHOWING REQUIRED BEFORE IDENTIFICATION OF ANY JOHN DOE SPEAKER MAY BE ORDERED.**

For amicus, the most important aspect of the decision that the Court will make in this case is its selection of the legal standard to govern subpoenas to identify anonymous defendants accused of wrongful speech. However, we complete our argument in this brief by explaining how amicus believes the *Dendrite / Cahill* factors should be applied in this case.

### **A. Courts Should First Endeavor to Ensure Doe Defendants Get the Best Possible Notice of the Attempt to Subpoena Their Identities and a Fair Opportunity to Oppose The Subpoena.**

The first requirement in the *Dendrite / Cahill* consensus approach is for the plaintiff to notify

the Doe of its efforts to take away his anonymity. It is apparent that one of the Does knows about this subpoena proceeding, we begin by discussing the notice issue to urge the Court to craft a notice requirement to guide the lower courts in future cases.

When a court receives a request for permission to subpoena an anonymous Internet poster, it should require the plaintiff to undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Columbia Insurance Co. v Seescandy.com*, 185 FRD at 579. Thus, in *Dendrite*, the trial judge required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. The Appellate Division specifically approved this requirement. 342 NJ Super. at 141, 775 A2d at 760.

Indeed, notice and an opportunity to defend is a fundamental requirement of constitutional due process. *Jones v Flowers*, 547 US 220 (2006). Although mail or personal delivery is the most common method of providing notice that a lawsuit has been filed, there is ample precedent for posting where there is concern that mail notice may be ineffective, such as when action is being taken against real property and notice is posted on the door of the property. *Id.* at 235. In the Internet context, posting on the Internet forum where the allegedly actionable speech occurred is often the most effective way of reaching the anonymous defendants, at last if there is a continuing dialogue among participants, and the Court is urged to follow the *Dendrite* example by requiring posting in addition to other means that are likely to be effective.

In many cases, posting will not be the only way of giving notice to the Doe. If a subpoena

is sent to the ISP that provides Internet access to the Doe, then the ISP will commonly have a mailing address for its customer. Or if the host of the web site requires registration as a condition of posting, and requires the provision of an email address as part of registration, then sending a notice to that email address can be an effective way of providing notice. To be sure, such notice is not always effective, because Internet users sometimes adopt new email addresses, and either drop or stop using their old addresses; they do not always think to notify all of the web sites where they have given their old addresses. For example, in the 2009 *Brodie* case in Maryland, Public Citizen's client, Independent Newspapers, gave email notice that it had received a subpoena to identify the owners of certain pseudonyms; one of those owners did not receive the message and, in fact, did not learn that there were proceedings to identify her until she read an account of the case in the *Washington Post* that mentioned her pseudonym, which had figured in the oral argument.

The industry standard is to provide two weeks or fifteen days' notice, although a Virginia statute requires twenty-five days. Va. Code §§ 8.01-407.1(1) and (3). The Cyberslapp Coalition proposed a model standard for ISP's that would allow up to thirty days for Does to move to quash. <http://cyberslapp.org/about/page.cfm?pageid=6>. The time allowed for the Doe to oppose the subpoena should take into consideration whether the controversy is purely a local one; if participation is national, the time for notice should take into consideration not just the time needed to find counsel where the Doe resides, but also to find local counsel in the jurisdiction where a motion to quash would have to be filed.

The Virginia statute cited above requires plaintiff to serve its entire showing of a meritorious case on the ISP along with the subpoena, thirty days before the date when compliance is due, and requires the ISP to furnish a copy of plaintiff's packet to the Doe within five days after that. *Id.* This

enables the Doe to prepare a motion to quash without having to contact plaintiff. Indeed, lawyers who represent Does often find that plaintiff's counsel does not cooperate by providing its basis for seeking identification; plaintiff may provide its **real** basis for discovering the defendant's identify only in a reply brief filed when it is too late for the Doe to respond. The Virginia statute avoids that problem.

The record does not reflect that plaintiff undertook any efforts to notify the Doe defendants of the pendency of his subpoena seeking their identifying information. Should there be a remand in this case, the Court should ensure that either plaintiff, or PubPeer, has given the best possible notice to all of the Does.

**B. In the Trial Court, Sarkar Pleaded Verbatim the Allegedly Defamatory Words, But His Appellate Briefing Makes It Unclear Whether He Is Now Seeking Identification of Does Defendants Based on Words That He Has Not Pleaded.**

The qualified privilege to speak anonymously requires a court to review the plaintiff's claims to ensure that he does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the court should require the plaintiff to set forth the exact statements by each anonymous speaker that are alleged to have violated his rights. "The law requires the very words of the libel to be set out in the declaration in order that the court or judge may judge whether they constitute a ground of action." *Royal Palace Homes v Channel 7 of Detroit*, 197 Mich App 48; 53 495 NW2d 392 (Mich App 1992) (emphasis deleted). See also *Ledl v Quik Pik Food Stores*, 133 Mich App 583, 589; 349 N.W.2d 529, 532 (1984), quoting *Pursell v Wolverine-Pentronix, Inc.*, 44 Mich App 416, 421; 205 N.W.2d 504 (1973) (pleading must include "allegations as to the particular defamatory words complained of"). For example, the court can assess whether the language charged as defamatory is an assertion of fact, which can be true or false and hence subject to a defamation action, or only a

rhetorical statement of opinion, which is immune from litigation because, in our system of free speech, “there is no such thing as a false idea.” *Gertz v Welch*, 418 US 323, 339 (1974). The court can also ascertain whether the statement was “of and concerning” the plaintiff, as both libel law and the First Amendment require, *Rosenblatt v Baer*, 383 US 75, 83 (1966), whether the defamation action had been filed within the statute of limitations, and other matters that might bar the claim on the face of the complaint. Michigan is but one of many states, and many federal courts, that require that defamatory words be set forth verbatim in a complaint for defamation. *Asay v Hallmark Cards*, 594 F2d 692, 699 (CA8 1979).

In this case, the complaint recited verbatim the language of the comments on the PubPeer web site, thus bringing Sarkar into compliance with the First Amendment’s requirements on this prong of the test. As we discuss in the next part of this brief, most of the statements on which Sarkar said he was suing appear to be highly factual— they were assertions about specific images found in Sarkar’s published work. On appeal, however, Sarkar has apparently walked away from his claim that the factual assertions about his work are defamatory, saying that the case is not “about whether scientific blots look alike,” or “the similarity of blots, Br. at 1-2, but about “blatantly false accusations of ‘scientific misconduct.’” But if this is the gist of Sarkar’s claim, he can only pursue enforcement of this subpoena insofar as he seeks to identify any Doe commenters who made that accusation (assuming that the Court deems such accusations actionable). Sarkar’s brief does not identify the statements in the record in which Does accused him of research misconduct; the only citations in the brief refer to paragraphs in the complaint that explain why a charge of misconduct is a serious one. Br. at 4, citing Complaint ¶¶ 33-36. The Court should require Sarkar to quote the words of the Does whom he is suing for accusing him of research misconduct; the orders under



appeal should be affirmed, or reversed, to the extent that Sarkar argued below about the specific comments about images in his published work.

**C. Statements That Accused Sarkar of Research Misconduct May Well Not Be Actionable.**

Had Sarkar pleaded only that the anonymous commenters falsely identified certain images as having appeared Sarkar's published research results, or that commenters falsely described the images in plainly false ways, those could well be statements of fact whose falsity might have injured Sarkar's reputation; thus such statements might be actionably false. And presumably these are facts on which Sarkar could easily produce evidence of falsity, **if**, of course, those assertions are false. But in his appellate brief, Sarkar appears to be distancing himself from the very fact-specific allegations in his complaint, and suggesting that his defamation claim rests instead on statements in which Doe defendants are said to have accused him of "research misconduct" or "scientific misconduct."

Although these would, indeed, be serious charges, they might not be defamatory because they might well be expressions of opinion based on disclosed fact. Restatement (Second) of Torts, § 566; *Fisher v Detroit Free Press*, 158 Mich App 409, 415; 404 NW2d 765 (1987); *Patton Wallcoverings v Kseri*, 2015 WL 3915916, at \*3 (ED Mich June 25, 2015). Just as the majority opinion in *Cooley* recognized that not all accusations of criminality are defamatory, 300 Mich App at 268, citing *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 12-13; 602 NW2d 233 (1999), not all references to "scientific misconduct" are defamatory. Once Sarkar identifies the specific words that Sarkar identifies as being the statements he claims are actionable for this reason, the Court should assess whether they meeting the constitutional test for being actionable statements of fact.

Sarkar’s brief also argues that his legal claims are not limited to defamation, and he accuses PubPeer of misleading the Court by its focus on the insufficiency of his defamation claims. But Sarkar cannot avoid the First Amendment limitations on his defamation claims by changing the label of the tort. *Hustler Magazine v Falwell*, 485 US 46, 56 (1988); *Nichols v Moore*, 396 F Supp2d 783, 799 (ED Mich 2005), *aff’d*, 477 F3d 396 (CA6 2007); *Ireland v Edwards*, 230 Mich App 607, 624-25; 584 NW2d 632 (1998). Although the foregoing cases held that such claims as invasion of privacy and intentional infliction of emotional distress must meet the First Amendment limits for defamation claims, the Sixth Circuit has applied the same rule to business-related claims, refusing to allow plaintiffs to “avoid the protection afforded by the Constitution . . . merely by the use of creative pleading” that changes the name of the cause of action. *Compuware Corp. v Moody’s Investors Services*, 499 F3d 520, 530 (CA6 2007) (claim for breach of contract). A necessary element of claims for tortious interference with business is the use of “wrongful means” to achieve the end, such as by fraud or misrepresentation, and when the wrongful means is a statement that injures reputation, the same First Amendment protections apply. *Jefferson County School Dist. No. R-1 v Moody’s Investor Services*, 175 F3d 848, 857-858 (CA10 1999) (intentional interference with contract, intentional interference with business relations); *Unelko Corp. v Rooney*, 912 F2d 1049, 1058 (CA9 1990) (product disparagement, “trade libel” and tortious interference with business relationships); *Blatty v New York Times Co.*, 42 Cal3d 1033, 1047-1048; 728 P2d 1177, 1185-1186 (1986) (negligent interference with prospective economic advantage); *Redco Corp. v CBS*, 758 F2d 970, 973 (CA3 1985) (unless defendants “can be found liable for defamation, the intentional interference with contractual relations count is not actionable”); *Amerisource Corp. v Rx USA Int’l*, 2010 WL 2160017 at \*7 (EDNY May 6, 2010). Consequently, the counts in Sarkar’s complaint

alleging tortious interference with business relations, business expectancy and privacy, and intentional infliction of emotional distress, do not provide an alternate basis for meeting *Dendrite's* third requirement.

**D. Sarkar Presented No Evidence That the Does Made Any False Statements About Him.**

Even if the Court concludes that at least one statement is objectively verifiable and hence actionable, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against that defendant. This requirement, which has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, prevents a plaintiff from being able to identify his critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need to identify the defendants simply to proceed with their case. However, relief is generally not awarded to a plaintiff unless and until the plaintiff comes forward with evidence in support of his claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major form of relief in cases like this. Requiring actual evidence to enforce a subpoena is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F2d 5, 6-9

(CA2 1982); *Richards of Rockford v PGE*, 71 FRD 388, 390-391 (ND Cal 1976). Cf. *Schultz v Reader's Digest*, 468 FSupp 551, 566-567 (ED Mich 1979). In effect, the plaintiff should be required to meet the summary judgment standard of creating genuine issues of material fact on all issues in the case before it is allowed to obtain their identities. *Cervantes v Time*, 464 F2d 986, 993-994 (CA8 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994.

The extent to which a plaintiff who seeks to compel disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of his claims at the outset of his case varies with the nature of the element. On many issues in suits for defamation or disclosure of inside information, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false (in a defamation action) or rests on confidential information (in a suit for disclosure of inside information). Thus, it is ordinarily proper to require a plaintiff to present proof of such elements of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant.

Here, even if the complaint were facially adequate, Sarkar's subpoena fails because he has adduced no evidence in support of its complaint. There was no evidence that any of the Does misstated facts underlying any charges of scientific or research misconduct. And there is no reason why Sarkar should not have sufficient command of evidence showing that statements about his work are false, and there is, concomitantly, no reason why Sarkar should be unable to produce evidence of falsity at the outset of the litigation, assuming that the statements really are false. By the same token, Sarkar's refusal to offer any evidence in support of his claims, along with the fact that, on

appeal, Sarkar is downplaying the issue of whether the “statements about the inkblots” are factually false, suggests that his defamation claims are spurious.

**E. The Balance of Sarkar’s Interest in Avoiding Criticism and the Does’ First Amendment Right to Remain Anonymous Tips in the Does’ Favor.**

Even if, on remand, Sarkar submits evidence sufficient to establish a prima facie case of defamation against each Doe defendant,

the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant’s case . . . . If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . . . On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.

*Missouri ex rel. Classic III v Ely*, 954 SW2d 650, 659 (Mo App 1997).

Just as the Missouri Court of Appeals approved such balancing in a reporter’s source disclosure case, *Dendrite* called for such individualized balancing when the plaintiff seeks to compel identification of an anonymous Internet speaker:

[A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.

The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.

*Dendrite*, 775 A2d at 760-761.

*See also Mobilisa v Doe*, 170 P3d at 720; *Highfields Capital Mgmt. v Doe*, 385 F Supp2d at 976.

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of his case on subjects that are based on information within his own control, there is no basis to breach the anonymity of the defendants. *Bruno & Stillman vGlobe Newspaper Co.*, 633 F2d 583, 597 (CA1 1980); *Southwell v Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (WD Mich 1996). Similarly, if the evidence that the plaintiff is seeking can be obtained without identifying anonymous speakers or sources, the plaintiff is required to exhaust these other means before seeking to identify anonymous persons. *In re Petroleum Prod. Antitrust Litig.*, 680 F2d 5, 8-9 (CA2 1982); *Zerilli v Smith*, 656 F2d 705, 714 (DC Cir 1981) (“an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure”). Requiring that there be sufficient evidence to prevail against the speaker, and sufficient showing of the exhaustion of alternate means of obtaining the plaintiff’s goal, to overcome the defendant’s interest in anonymity is part and parcel of the requirement that disclosure be “necessary” to the prosecution of the case, and that identification “goes to the heart” of the plaintiff’s case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is “necessary.”

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities, is particularly appropriate because an order of disclosure is an injunction—and not even a preliminary one at that. A refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker’s name is published to the world, she loses her anonymity and can never get it back. Moreover, any violation of an individual speaker’s First Amendment rights constitutes

irreparable injury. *Elrod v Burns*, 427 US 347, 373-374 (1976). In some cases, identification of the Does may expose them to significant danger of extra-judicial retaliation.

Moreover, the adoption of a balancing approach can favor plaintiffs as well as anonymous defendants. For example, several courts have held that, although anonymous defendants accused of copyright infringement could be engaged in speech of a sort, the First Amendment value of offering copyrighted recordings for download is low, and the likely impact of being identified as one of several hundred alleged infringers is also likely low. *Call of the Wild Movie, LLC v Does 1-1*, 062, 770 F Supp2d 332, 349 (DDC Mar 22, 2011); *Sony Music Entertainment v Does 1-40*, 326 F Supp2d 556 (SDNY 2004); *London-Sire Records v Doe 1*, 542 F Supp2d 153, 164 (D Mass 2008). Hence, such courts accept a lower level of evidence to support the prima facie case of infringement. *Call of the Wild*, 770 F Supp2d at 351 nn.7, 8. It has been argued that these cases represent a copyright exception to the *Dendrite* rule, but other courts have, more properly, held that the cases turn on the nature of the speech at issue. *Art of Living Foundation v Does 1-10*, 2011 WL 5444622 (ND Cal Nov. 9, 2011). Similarly, in *In Re Anonymous Online Speakers*, 661 F3d 1168, 1177 (CA9 2011), the court of appeals said that when a Doe lawsuit is filed over commercial speech, the lesser protection that the First Amendment affords for commercial speech should be reflected in a more permissive approach to identifying the defendant. Although these courts do not explicitly invoke the balancing stage of *Dendrite*, they implicitly do so.

Applying the balancing stage, there is a very real danger of extra-judicial retaliation against the Does that merits consideration in striking the proper balance. This case arises in the context of serious controversy about ways in which the scientific establishment treats scientists who “blow the whistle” on senior scientists whose research is suspect. There have been many documented cases

of on-the-job retaliation against junior scientists who blow the whistle on scientific misconduct by supervisors. *E.g.*, Yong, Ledford & Van Noorden, *Research ethics: 3 ways to blow the whistle*, Nature, Vol 503, Issue 7477 (2013), posted at <http://www.nature.com/news/research-ethics-3-ways-to-blow-the-whistle-1.14226>; Kendall, Management Advisory- Inaction on Whistleblower Complaints Related to Scientific Integrity Complaints (July 2013), <http://naturalresources.house.gov/uploadedfiles/mgmtadvisoryfwsioigscience.pdf>. A report to the federal Office of Research Integrity found that some 69% of scientific misconduct whistleblowers reported at least one negative personal outcome, such as loss of position, denial of advancement, loss of research resources, and pressure/undue delays in investigative process. Unsurprisingly, negative outcomes are more frequent among more junior whistleblowers. Research Triangle Institute, *Consequences of Whistleblowing for the Whistleblower in Misconduct in Science Cases 14-16* (1995). And protection for anonymity can have a demonstrated impact on encouraging otherwise fearful whistleblowers to step forward: a report from the Association of Certified Fraud Examiners found that organizations that maintain a fraud reporting hotline are more likely to receive reports of fraud that warrant action, while organizations that do **not** have such a mechanism are far more likely to find out about fraud “by accident.” *Report to the Nations on Occupational Fraud and Abuse* (July 2012), posted at [www.acfe.com/uploadedfiles/ACFE-Website/Content/rtnn/2012-report-to-nations .pdf](http://www.acfe.com/uploadedfiles/ACFE-Website/Content/rtnn/2012-report-to-nations.pdf).

But the risks entailed in opposing a senior researcher are not limited to the danger of payback from unhappy supervisors. When scientists seek funding for future research projects, when they submit the results of their research for publication in journals, when they seek academic employment or are considered for promotion within their universities, they are subject to rigorous systems of review, and in some of those situations the identities of the outside reviewers are generally not



released to them. This system is rife with opportunity for silent and undiscoverable retaliation, and studies have recognized that problem. Suls and Martin, *The Air We Breathe: A Critical Look at Practices and Alternatives in the Peer-Review Process*, 4 *Perspectives on Psychological Science* 40 (2009), available on JSTOR at [http://www.jstor.org/stable/40212290?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/40212290?seq=1#page_scan_tab_contents); Triggles and Triggles, *What is the future of peer review?*, 3 *Vascular Health and Risk Management* 39 (2007), posted at [www.ncbi.nlm.nih.gov/pmc/articles/PMC1994041/pdf/vhrm0301-039.pdf](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1994041/pdf/vhrm0301-039.pdf).

As a senior cancer researcher and professor, plaintiff Sarkar has no doubt trained many younger scientists, some of whom may, like Sarkar himself, be on review panels that could enable them to exact payback against Sarkar's now-anonymous critics once their identities become generally known. And if those identities are released only to Sarkar himself, his ability to retaliate could be enhanced, because the authorities responsible for assigning peer review status to Sarkar will have no idea of reasons why he might be biased against certain grant applicants or article authors.

Amicus fully appreciates that allowing anonymous reviews is not an unmixed blessing. When an scientist posts an anonymous review, anonymity can make it impossible for readers to take into account the possible biases of the author; readers have to assess the review based on its intellectual merit alone. And there is heated debate in the scientific community about the virtues and defects of anonymous peer review. *E.g.*, *Science and Technology Committee for Peer Review Inquiry: Written Evidence*, posted at [www.publications.parliament.uk/pa/cm201011/cmselect/cmsctech/writev/856/856.pdf](http://www.publications.parliament.uk/pa/cm201011/cmselect/cmsctech/writev/856/856.pdf). But considering the words of the United States Supreme Court, which says that the choice of whether to reveal one's name is one of the choices of authorship that the First Amendment protects, *McIntyre*, 514 U.S. at 342, the danger that allowing an

anonymous poster will allow that writer to conceal her biases from readers, at the risk of having readers discount the analysis precisely because of the anonymity, should not be weighed against the anonymous speaker in the balancing analysis.

On the other side of the balance, the Court should consider the strength of the plaintiff's case and his interest in redressing the alleged violations. In this regard, the Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of significant damage to the plaintiff, and the extent to which the plaintiff's own actions are responsible for the problems of which he complains.

In that regard, reversal of the order allowing Doe to be identified, based on either lack of sufficient evidence or balancing the equities, would not compel dismissal of the complaint. The plaintiff retains the opportunity to renew his motion after submitting more evidence. Moreover, Sarkar's tort claims are at best weak ones—he is a public figure, and there is intense public interest in cancer research. Moreover, consumers of scientific papers have a significant interest in obtaining as much information as they can about possible errors in that work, so that they can decide how best to conduct their own further inquiry or, indeed, use the research in choosing medications and medical techniques. Thus the public interest weighs strongly in favor of the denial of the preliminary relief that Sarkar seeks, compelling the identification of online critics of his work.

\* \* \*

In sum, the failure to apply the *Dendrite* or *Cahill* standard represents an error of law that would put Michigan at odds with the unanimous approach of the other states that have addressed this issue, by allowing the abuse of judicial power to destroy the anonymous defendants' First Amendment right to speak anonymously, despite Sarkar's failure to show that his claims against any

of the Does have evidentiary merit.

### CONCLUSION

The order below should be reversed insofar as it denied part of the motion to quash and affirmed insofar as it granted the motion to quash, and the case should be remanded for further proceedings.

Respectfully submitted,

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January 19, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of January, 2016, a copy of the foregoing brief was filed with the court's electronic filing system, which will automatically serve it on all counsel:



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